In the Supreme Court of the United States.

October Term, 1902.

No. 150.

FRANK N. PROUT, ATTORNEY GENERAL,
Appellant,

v.

JAMES C. STARR, ET AL., IMPLEADED WITH THE CHICAGO ROCK ISLAND & PACIFIC RAILWAY COMPANY.

Brief for Appellees Star and Allerton.

This is an appeal from a decree of the Circuit Court of the United States for the District of Nebraska.

On the 3rd of August, 1893, these appellees, stockholders of the Chicago, Rock Island & Pacific Railway Company hereinafter called the Rock Island Company, filed their bill in the Circuit Court of the United States for the District of Nebraska against the Company and Hastings, Attorney General; Allen, Secretary of State; Moore, Auditor of Public Accounts; Bartley, Treasurer; and Humphrey, Commissioner of Public Lands of the State, who together, constituted

the Board of Transportation thereof and Dilworth, Kountz, and Johnson who were Secretaries of the said Board. In their bill, the plaintiffs alleged among other things that the Rock Island Company owned and operated lines of railroad from Chicago in Illinois, to Denver in Colorado, by way of Omaha, Beatrice, and Fairbury, in Nebraska, and that the legislature of Nebraska had passed an act entitled "An act to regulate railroads, to classify freights, to fix reasonable maximum rates to be charged for the transportation of freight upon each of the railroads in the state of Nebraska, and to provide penalties for the violation of this act" approved April 12, 1893; that the rates fixed in said act were one-fifth less than those theretofore charged by said Company; and that if said act and the said rates therein prescribed should go into operation, the earnings of said Company from its business in the state and especially from its freight business, would be more than one-fifth less than it had theretofore realized, and would not pay the operating expenses thereof, nor yield any money from which the said property may be maintained, and would in effect work a confiscation thereof; that the said defendants threaten, and unless restrained by the order and injunction of this Court, will put in action the full powers of said board under the said act, and the other

laws of said State, and enforce the commands, injunctions and prohibitions thereof against said Company, and order the Attorney General and the county attorneys of the several counties through which said road or any or either of them run, to institute suits to compel said Company to comply with the orders of the said board in that behalf; and apply to the Supreme and District Courts of the state, in its name, on the relation of the board, for writs of mandamus to compel said Company to obey the said orders; and also require the Attorney General and the said county attorneys to prosecute said Company for each and every act done or omitted, commanded, or forbidden by said statute, and seek to impose upon said Company, the severe penalties therein prescribed; which actions and proceedings would be numerous, and if effectively prosecuted, would sweep away all of the said Company's property; that the said Attorney General had given notice to the Company that it was his purpose and the purpose of said board to enforce against it, all of the provisions of said above mentioned act promptly, vigorously and to the full extent of the powers conferred upon him and upon the board in that behalf, if the Company do or omit to do any of the matters and things in the said act commanded or forbidden, and that the said Attorney General would

personally take charge of such proceedings and prosecute them to the full extent of the said act; that the roads of said Company in the said state had never earned upon the business thereon, their operating expenses and fixed charges, although its administration had been conducted with exceptional skill and judgment, and returns from its business were all that the same could be made to render.

And the said plaintiffs in their said bill insisted that the said act if put into force, would take from the said Company its property without compensation and without due process of law, contrary to the provisions in that behalf of the Constitution of the United States.

Many facts and circumstances were set forth and pleaded in the said bill, supporting the above and other contentions. The plaintiffs further alleged that they were stockholders of the Company and had applied to its officers and directors to take proceedings to contest the validity of said act and resist all actions to enforce it, but they had refused to do so, and they prayed that the said Company, its officers, agents and employees, be by the order and injunction of this Court, enjoined from making, or publishing, or posting in its depots and stations, a schedule of rates to be charged by it for the transportion of freight

on or over its said roads, according to the terms, provisions and commands of the above entitled act, and from reducing its charges for such service from the rates then charged by it to those prescribed by the said act, and from obeying, observing or conforming to the commands, provisions, injunctions and prohibitions of said act or any thereof; and that the said Board of Transportation, and its members and secretaries, be also enjoined from entertaining or determining any complaint against said Company for or on account of any act or thing by its officers, agents, servants or employes done, suffered or omitted which may be commanded or forbidden by said act, and from instituting, or prosecuting, or causing to be instituted or prosecuted any action or proceeding against said Company for any act or thing by it or its officers, agents, servants or employes done or omitted, which may be forbidden or commanded by said act; and that the said Hastings, Attorney General of said state, be in like manner enjoined from bringing or aiding in bringing, or causing or advising to be brought, any proceeding by way of injunction or mandatory or other process or civil action or indictment against said Company for or on account of the non-observance by it of the provisions of the said act; and that if any county attorney or other person should bring or

threaten to bring any action or proceedings to the like effect, his name should be inserted in the said bill as a defendant, and he be in like manner enjoined from instituting, prosecuting or advising any such actions or proceedings; and that the said act be by the decree of the Court declared to be repugnant to the provisions of the Constitution of the United States, and of said state, and that it be further decreed that the said injunction therein prayed, be perpetual.

Thereupon, an order of said Court was issued enjoining the said railroad company, its directors, officers, agents and counselors and the said Board of Transportation and its members and the said Attorney General as in the said bill prayed; which order was duly served upon each and every of the said defendants, together with process of subpoena.

At the same time, three other bills were filed in said Court, one by stockholders of the Chicago, Burlington & Quincy Railroad Company, hereinafter called the Burlington Company, another by stockholders of the Chicago and Northwestern Railway Company, hereinafter called the Northwestern Company; and a third by stockholders of the Union Pacific Railway Company, hereinafter called the Pacific Company, the defendants therein were, in one of said bills the Burlington, in another the Northwestern, and in the

third, the Union Pacific Railway Company, and in all of them the officers of said state, composing the Board of Transportation, and the secretaries thereof. In all said bills, the same facts and circumstances were alleged and the same relief prayed as in the bill against the Rock Island Company. All of the said state officers appeared and answered by the same counsel and alleged the same facts, circumstances, defenses and contentions, and particularly that "they and each of them and all of them are officers and agents of said State of Nebraska, and have no personal or pecuniary interest whatever in the event of this suit, or in the result of the several matters and things charged and set forth in said complainant's bill of complaint herein filed, and are not proper parties thereto, but that said bill of complaint should of right have been brought against the State of Nebraska, and not against these defendants, or either of them, and that the said State of Nebraska is the real party in interest, and that said State of Nebraska hath not and doth not in any way whatever consent to the bringing of this action, and hath not and doth not submit in any way to the jurisdiction of said Court to hear and determine the several matters in difference charged and set forth in complainants' bill of complaint, and these defendants submit that under the Eleventh

Amendment of the Constitution of the United States, the courts of the United States are wholly without jurisdiction to try, hear and determine the several matters in difference charged and set forth in said complainants' bill of complaint and that under the Constitution of the United States and the Constitution and laws of the State of Nebraska, said complainants have a full, complete and adequate remedy at law for all the matters alleged and set forth in said complainants' bill of complaint."

Voluminous proofs were taken in the Burlington, Northwestern and Union Pacific cases; and decrees were rendered according to the prayer of the bills therein, which have been substantially affirmedby this Court.

In consequence of the great expense attending the taking of the proofs, pending the four suits, the parties to this suit plaintiffs and defendants, agreed that the proofs in the three cases should be taken and accepted in the Rock Island case with the same force and effect as if taken therein; that the said case should not be further particularly proceeded in until the Supreme Court shall have rendered its decree in the other three cases, when a decree should be entered in the Rock Island case conformable to those entered by the Supreme Court in the other three cases. Accord-

ingly no testimony has been taken in the Rock Island case.

Hastings, the Attorney General when the bills were filed, was, pending the appeals, succeeded by Smyth, who, by proper order was substituted as defendant and appellant.

In 1890, Smyth as Attorney General brought an action in the Supreme Court of the State in the name of the State against the Rock Island Company, alleging that the Company, in violation of the Act of April 12, 1893, at divers times had charged for the transportation of freight between points on its road in Nebraska, rates in excess of those fixed by the act, and claimed judgment for $310,000 besides interest and costs. His attention being called to the injunction order issued upon the bill of the plaintiffs, he gave their counsel to understand that before the expiration of his term of office, then shortly to ensue, he would dismiss the action; relying upon which agreement and understanding, the plaintiffs took no proceedings to enforce the injunction order, nor were any proceedings taken in the action, except to take a stipulation extending the time of the defendant to answer.

The appellant succeeded Smyth in January, 1891, and being informed of Symth's agreement he declined

to dismiss the action for the penalties. The Company then filed its answer alleging the injunction, to which no reply was ever filed. On the 15th of February, the Company moved the Court for judgment on the pleadings, which was overruled upon grounds set out in its opinion.

The opinion is fully set out in the appellant's brief and is reported under the style of *State v. Chicago, Rock Island & Pacific Railway Company*, 61 Neb., 545. No further proceedings have been had in said action. The injunction has never been vacated, modified or discharged, and is in full force and effect.

Attorney General Smyth also brought another action in one of the District Courts, for the State against the Company, for $150,000, his petition being in the same terms as that filed in the action in the Supreme Court, but it has been dismissed and need not be further mentioned.

On the 6th of April, 1901, Starr and Allerton filed their supplemental bill reciting briefly the contents of their original bill, and of the answer thereto, the issue and service of the injunction, and then proceeded as follows:

> "At or about the time when your orators exhibited their said bill in this Honorable

Court, three several bills were filed therein by the stock holders of the Chicago, Burlington & Quincy Railroad Company, the Chicago & Northwestern Railway Company, and the Union Pacific Railroad Company, respectively, in which substantially the same facts were alleged as were stated by your orators in their original bill first above referred to; and in and by the said bills, relief was prayed substantially the same as that prayed by your orators in their said bill. The defendants in the said three several bills, were the said companies respectively, and the members and secretaries of the Board of Transportation. Said defendants answered the said three several bills by alleging substantially the same facts as were alleged by them in answer to that of your orators, and the defendants in all of said four bills appeared and were represented by the same counsel. Voluminous proofs were taken upon the said three several bills, and the same came on to be heard before your Honors in this Honorable Court, whereupon decrees were rendered according to the prayer thereof: which decrees have been substantially affirmed by the Supreme Court of the United States. In con-

sequence of the great expense of taking the said proofs upon the said bills of your orators, it was agreed and understood, that the proofs upon the three several bills above mentioned, should be taken and accepted as proofs upon the said bill of your orators, with the same force and effect as if taken thereon; and that your orators' said bill should not be further particularly proceeded upon until the decree of the Supreme Court upon the three other bills already mentioned, should be rendered; and that whatever decree should finally be rendered by the Supreme Court upon the three bills removed thereto upon appeal, should be entered in this Honorable Court upon that of your orators. pending the prosecution of the three several bills in this Honorable Court and the appeals from the decrees thereof, in pursuance of the aforementioned agreement, no testimony was taken upon the said bill of your orators."

The prayer was as follows:

"Wherefore, your orators pray that the order and injunction allowed by this Honorable Court upon their bill, be extended to and against the said Frank N. Prout as Attorney

General of said state, and by the order of your Honors, he be subjected to the commands, injunctions and prohibitions therein set forth; and that said Attorney General be particularly enjoined and restrained from further prosecuting the two several actions brought in the name of the State of Nebraska against the said railway company, and in anywise proceeding therein; and that your orators and the other stockholders of said Company, have all such other and further relief as the circumstances require and is agreeable to equity and good conscience."

To this supplemental bill the appellant filed his demurrer on the ground that the bill was against the defendant in his official capacity as Attorney General of the State and was against the State and therefore the Court was under the eleventh amendment of the constitution without jurisdiction.

This demurrer was argued before Sanborn, Circuit Judge, and Munger, District Judge, and was overruled; and the injunction prayed for was issued.

The order directing the injunction provided that if the appellant elected to stand by his demurrer and declined further to plead, decree should go as in the case of *Smyth v. Ames*; and he having announced in

open Court that he declined to further defend against the said bills, decree was rendered conformable to that in *Smyth v. Ames.*

I.

It is enough for the purposes of this case that the parties to it agreed that it should abide the event in this Court of the other three cases.

This was, under the circumstances, a very proper arrangement. The supplemental bill alleges that the bills in all the four cases stated the same facts and prayed the same relief; that the answer in all of them stated the same matters; that the counsel for the defendants were the same, and that the Circuit Court rendered decrees according to the prayer of the bills. All these allegations of the supplemental bill are admitted by the demurrer thereto.

Furthermore, the bill alleged, and the demurrer admitted, that voluminous proofs had been taken in the three cases, and that the expense of taking them over again would be very great.

Under these circumstances, an agreement in the Rock Island case that it should abide the result here of the three cases was eminently proper.

The supplemental bill alleges and the demurrer

admits that it was agreed that whatever decrees should be rendered by this Court in the three cases pending here on appeal, should be entered in the Circuit Court upon the Rock Island bill; that the decrees of that Court were substantially affirmed and that the parties acted on their agreement, and took no testimony upon the Rock Island bill.

In such a case the Circuit Court should enforce the agreement by entering a decree like those rendered here.

The Pacific Railroad v. Ketchum, 101 U. S., 289, was a bill filed in the Circuit Court for the Eastern District of Missouri, by Ketchum, a stockholder of the Company, for the foreclosure of a mortgage on its road and other property, to secure certain bonds and interest thereon, against the Company and the trustees appointed in the mortgage, on account of a default in the payment of interest. There were three mortgages of the company on the property prior to that alleged by Ketchum. Proper allegations were made in the bill justifying Ketchum in bringing it. Three other stockholders, upon their application, were admitted as plaintiffs with Ketchum; and others were, upon their request, made defendants. After various proceedings in the suit, a decree of the Circuit Court was rendered, reciting that "by the consent of

all parties to the suit, through their solicitors of record," decree was rendered "that the said Pacific Railroad do stand absolutely barred and foreclosed of and from all equity of redemption of, in and to the mortgage premises, property and franchises" and ordering that the same be sold. The Railroad Company appealed to this Court and the question was raised whether the Company was bound by the consent recited in the decree.

Mr. Chief Justice Waite delivered the opinion of the Court, in which he said on page 297:

> "This disposes of all mere errors in form which are alleged against the decree. Parties to a suit have the right to agree to anything they please in reference to the subject-matter of their litigation, and the Court, when applied to, will ordinarily give effect to their agreement, if it comes within the general scope of the case made by the pleadings. It was within the power of the parties to this suit to agree that a decree might be entered for a sale of the mortgaged property without any specific finding of the amount due on account of the mortgage debt, or without giving a day of payment. It was also competent for them to agree that if the property was bought at the sale by

or for the bondholders, payment of the purchase money might be made by a surrender of the bonds. And so of all the other provisions of the decree which are complained of. All these were matters about which the parties might properly agree; and having agreed, it does not lie with them to complain of what the Court has done to give effect to their agreement."

In such a case, the Court would enforce the agreement by entering a decree like that rendered by this Court.

II.

But had there been no agreement to abide the result of the three cases of the Burlington, Northwestern and Union Pacific Companies, the decision of the question of jurisdiction in them is conclusive in the case at bar. The issues, circumstances and contentions in those cases, were in all respects precisely the same as in this, as well those relating to jurisdiction, as all other matters. There is no possible room for any distinction between them.

In the three cases, Mr. Justice Harlan delivered the opinion of the Court, and said on this subject:

Smyth v. Ames, 169 U. S., 466 (518).

"Another question of a preliminary character must be here noticed. The answer of the officers of the State in each case insists that the real party in interest is the State, and that these suits are, in effect, suits against the State, of which the Circuit Court of the United States cannot take jurisdiction consistently with the Eleventh Amendment of the Constitution of the United States. This point is, perhaps, covered by the general assignments of error, but it was not discussed at the bar by the representatives of the State Board. It would therefore be sufficient to say that these are cases of which, so far as the plaintiffs are concerned, the Circuit Court has jurisdiction not only upon the ground of the diverse citizenship or alineage of the parties, but upon the further ground that, as the statute of Nebraska under which the State Board of Transportation proceeds is assailed as being repugnant to rights secured to the plaintiffs by the Constitution of the United States, the cases may be regarded as arising under that instrument. But to prevent misapprehension, we add that, within the

meaning of the Eleventh Amendment of the Constitution, the suits are not against the State but against certain individuals charged with the administration of a state enactment, which, it is alleged, cannot be enforced without violating the constitutional rights of the plaintiffs. It is the settled doctrine of this Court that a suit against individuals for the purpose of preventing them as officers of a state from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the State within the meaning of that Amendment. *Pennoyer v. McConnaughy*, 140 U. S., 1, 10. *In re Tyler*, 149 U. S., 164, 190; *Scott v. Donald*, 165 U. S., 58, 68; *Tindal v. Wesley*, 167 U. S., 204, 220."

All this must be retracted without reservation or the contention of the appellants here must be overruled. There is no alternative.

And not only is this true of the three cases in which the opinion was delivered, but it is equally so of several others.

Reagan v. Farmers' Loan & Trust Company, 154 U. S., 362, is one of them. In 1891, the legislature of the State of Texas passed an act to establish a rail-

road commission, providing that the commission should make rates for the transportation of freight and passengers on all railroads in that state, and provided penalties to be imposed upon any Company which should charge, collect, demand, or receive a greater charge or compensation than that fixed by the said commission; and made it the duty of the Attorney General to institute suits in the name of the state for the recovery of the penalties prescribed by the act.

Reagan, McLean, and Foster were duly appointed and qualified as members of the commission. Culbertson was the Attorney General of the state. The commission proceeded under the act to establish rates, and the Farmers' Loan & Trust Company filed its bill in the Circuit Court of the United States for the Western District of Texas, against the three railroad commissioners, the Attorney General and certain other parties not material here to be mentioned. After alleging certain preliminary facts, the bill averred that the rates fixed by the commission were unreasonable and unjust, setting forth facts, which, it claimed, established the injustice and unreasonableness of those rates, and prayed a decree restraining the commission from enforcing them, and the Attorney General from instituting any suits against the Company to recover

damages for failing to conform to such rates. The case came on to be heard upon demurrer to the bill, which was overruled, and, the commissioners and Attorney General refusing to answer, the bill and amendments thereto were taken as confessed and a decree was rendered, enjoining Culbertson acting as Attorney General of the state and his successors in office, from instituting or authorizing or directing any suit or suits, action or actions against the said Railroad Company for the recovery of any penalties under and by virtue of the provisions of the act creating the commission.

Mr. Justice Brewer delivered the opinion of the Court in which he said:

> "We are met at the threshold with an objection that this is in effect a suit against the State of Texas, brought by a citizen of another state, and, therefore, under the Eleventh Amendment to the Constitution, beyond the jurisdiction of the Federal Court."

Having thus stated the question, the learned judge proceeded to examine it upon the authorities and upon principle, quoting from the opinion of Mr. Justice Lamar in *Pennoyer v. McConnaughy*, 140 U. S., 1, as follows:

"It is well settled that no action can be maintained in any Federal Court by the citizens of one of the states against a state without its consent, even though the sole object of such suit be to bring the state within the operation of the constitutional provision which provides that 'no state shall pass any law impairing the obligation of contracts.' This immunity of a state from suit is absolute and unqualified, and the constitutional provision securing it is not to be so construed as to place the state within the reach of the process of the Court. Accordingly, it is equally well settled that a suit against the officers of a state, to compel them to do the acts which constitute a performance by it of its contracts, is, in effect, a suit against the state itself.

"In the application of this latter principle, two classes of cases have appeared in the decisions of this Court, and it is in determining to which class a particular case belongs that differing views have been presented.

"The first class is where the suit is brought against the officers of the state, as representing the state's action and liability, thus making it, though not a party to the record, the real party

against which the judgment will so operate as to compel it to specifically perform its contracts. *In re Ayers*, 123 U. S., 443; *Louisiana v. Jumel*, 107 U. S., 711; *Antoni v. Greenhow*, 107 U. S., 769; *Cunningham v. Macon & Brunswick Railroad*, 109 U. S., 446; *Hagood v. Southern*, 117 U. S., 52.

"The other class is where a suit is brought against defendants who, claiming to act as officers of the state, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the state. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the state, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain, legal duty, purely ministerial—is not, within the meaning of the Eleventh Amendment, an action against the state. *Osborn v. Bank of the United States*, 9 Wheat., 738; *Davis v. Gray*, 16 Wall., 203;

Tomlinson v. Branch, 15 Wall., 460; *Litchfield v. Webster County*, 101 U. S., 773; *Allen v. Baltimore & Ohio Railroad*, 114 U. S., 311; *Board of Liquidation v. McComb*, 92 U. S., 531; *Poindexter v. Greenhow*, 114 U. S., 270."

Applying the principle thus clearly stated to the case in hand Mr. Justice Brewer goes on to say, p. 390:

"So far from the State being the only real party in interest, and upon whom alone the judgment effectively operates, it has in a pecuniary sense no interest at all. Going back of all matters of form, the only parties pecuniarily affected are the shippers and the carriers, and the only direct pecuniary interest which the State can have arises when it abandons its governmental character and, as an individual, employs the Railroad Company to carry its property. There is a sense, doubtless, in which it may be said that the State is interested in the question, but only a governmental sense. It is interested in the well-being of its citizens, in the just and equal enforcement of all its laws; but such governmental interest is not the pecuniary interest which causes it to bear the burden of an adverse judgment. Not a dollar

> will be taken from the treasury of the State, no pecuniary obligation of it will be enforced, none of its property affected by any decree which may be rendered. It is not nearly so much affected by the decree in this case as it would be by an injunction against officers staying the collection of taxes, and yet a frequent and unquestioned exercise of jurisdiction of Courts, State and Federal, is in restraining the collection of taxes, illegal in whole or in part."

Then the learned judge found that Culbertson, the Attorney General did not represent the State so as to make the judgment if against him effective against it. The Attorney General and this appellant were both impleaded in the bills, having the same official character and the same duties, and were threatening the same wrongs and injuries against the companies. There is no possible distinction to be taken between them.

III.

But were the question open to re-examination, the doctrine announced in those cases must be affirmed and applied here. That doctrine is that if in an action against State Officers, they seek shelter under the Eleventh Amendment, it must appear that a

judgment against them will operate effectively upon the rights or property of the state. If, on the other hand, they fail to connect themselves with the state by not showing that they as officers represent it in such a way that it will be affected by a judgment against them, they are, although officers, wrong doers; and as such, personally liable and not exempt from suit under the amendment. And they will fail if they allege a statute which is unconstitutional, just as much so as if they could not show that they were officers. Applying this doctrine the question what is the interest of the party against which relief is in fact asked and against which the decree effectively operates, is answered by Mr. Justice Brewer in the clause quoted above at page 24 of this brief.

If the clause of the injunction prohibiting actions for penalties be singled out, and it be said that money recovered in an action by and in the name of the State against the Company will go into the state treasury, the short answer is that by virtue of a constitutional provision, all those moneys go to the counties through which the road runs, and do not go into the state treasury, and the State has no right to them or interest on them.

Section 5 of Article VIII of the Constitution provides that:

"All fines, penalties and license moneys, arising under the general laws of the state, shall belong and be paid over to the counties respectively where the same may be levied or imposed, and all fines, penalties and license moneys, arising under the rules, by-laws, or ordinance of cities, villages, towns, precincts or other municipal subdivision less than a county, shall belong and be paid over to the same respectively. All such fines, penalties, and license moneys shall be appropriated exclusively to the use and support of common schools in the respective subdivisions where the same may accrue."

IV.

This decree is supported by another principle. That principle is that if two courts have concurrent jurisdiction of a controversy, the one in which suit is first brought will retain it until final disposition, to the entire exclusion of any process or inquiry in the other; or, stating it with reference to the facts of this case, if the State and Federal Courts had concurrent jurisdiction of this controversy, the original bill of the plaintiffs having been filed in the Circuit Court in 1893, and the State having brought its action in the State Court in 1900, the former must

proceed to decree without interference by the latter. We feel sure that the learned appellant will admit that a proper State Court could rightfully entertain the bill of these plaintiffs, when the defendants undertook to justify the acts complained of by an unconstitutional and therefore void Statute.

So too, this bill was within the jurisdiction of the Federal Court. As Mr. Justice Brewer says in Reagan's case, *supra*, at page 391.

> "Nor can it be said in such a case that relief is obtainable only in the Courts of the State. For it may be laid down as a general proposition that, whenever a citizen of a State can go into the Courts of a State to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the Federal Courts to maintain a like defence. A state cannot tie up a citizen of another state, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own Courts. Given a case where a suit can be maintained in the Courts of the state to protect property rights, a citizen of another state may invoke the jurisdiction of the Federal Courts. *Cowles v. Mercer County*, 7 Wall., 118; *Lincoln*

County v. Luning, 133 U. S., 529; *Chicot County v. Sherwood*, 148 U. S., 529."

The case then is that of concurrent jurisdiction in two Courts and of a suit brought in one of them, and the defendant therein afterwards bringing another involving the same matter and inquiry.

The rule which we have stated above, was declared by this Court at an early day, and has been enforced and illustrated, in a long series of cases.

One of the earlier cases is that of *Peck v. Jenness*, 7 How., 612. Jenness, Gage & Company sued Peck & Bellows in one of the State Courts of New Hampshire and on the 10th of October, 1842, sued out an attachment which was levied upon the goods of the defendants.

On the 28th of December, 1842, the defendants were declared bankrupts by the District Court of the United States for New Hampshire, and Howland was appointed their assignee. On the 21st of June following, the defendants received a certificate of discharge. On the 25th of July following, Howard, the assignee, presented to the Distict Court a petition setting forth the plaintiff's attachment and averring that it was not a valid lien on the goods, and that, therefore, the sheriff had no right to detain them and prayed that the sheriff be ordered and decreed to surrender them to

the assignee or account for their value, and the Court decreed accordingly. The judgment was carried to this Court by a writ of error under the 25th section of the Judiciary Act. The question presented to this Court was, whether the District Court was vested with any power or authority to oust the State Court of its jurisdiction over the cause and supersede its judgment.

Mr. Justice Grier delivered the opinion of the Court, in which he said: (p. 624.)

> "It is a doctrine of law too long established to require a citation of authorities, that, where a Court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other Court; and that, where the jurisdiction of a Court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another Court. These rules have their foundation, not merely in comity, but on necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other."

Chittenden v. Brewster, 2 Wall., 191, was a creditor's suit brought in the Circuit Court for the Northern District of Illinois against a judgment debtor and his assignees, to set aside an assignment made by him to Brewster and Clark to hinder and delay creditors. The assignment purported to convey to the assignee all of the property of the debtor in trust to convert the same into money and pay certain preferred creditors. In their answers, the assignees alleged that after the filing of the creditor's bill, a bill in chancery had been filed in the State Court against them in behalf of other creditors of the judgment debtor, praying a receiver to take possession and charge of the property conveyed by the assignment, and to have the trusts created thereby carried into effect; a receiver was appointed and in pursuance of the order of the State Court, all the property had been transferred to him. Brewster appeared to this bill, but did not answer or otherwise defend against the same. A decree was rendered ordering the trusts in the assignment carried into effect and appointed Mitchell receiver to whom Brewster assigned all the property. The bill filed in the Federal Court came on to be heard upon the pleadings and proofs and the Court declared the assignment void and set it aside, and appointed Moulton receiver to whom the

debtor and the assignees were ordered to assign and transfer all the property which had come to their hands, except such as since the service of process, had been transferred to the receiver appointed by the State Court.

From this decree, the plaintiffs appealed to this Court on the ground that the proceeding in the State Court should have been treated as an interference with the federal jurisdiction previously acquired.

Mr. Justice Nelson delivered the opinion of the Court, in which he said that it was incumbent upon the assignees that:

> "They should have appeared and defended that suit; and, in addition to the defence on the merits, that is of their faithful execution of the trust, which was impeached by the bill, they should have set up the pending proceedings against them in the Federal Court, which tribunal had first acquired jurisdiction over them, and over the fund in dispute, and were entitled to deal with it, and with all questions growing out of the relations existing of debtor and creditor of the parties concerned. Instead, however, of pursuing this course, no defence, as appears, was set up by the defendants to the suit; no answer filed, nor even opposition made

to the motion for the appointment of a receiver. The only part they seem to have taken in the proceedings is, besides acknowledging service of the notice of the motion for a receiver, the solicitors entered their appearance in the cause, and gave consent that the motion might be made at the then February Term of the Court. It was at once made, and the receiver appointed and gave the requisite security.

"Now, we think, here was a clear omission of duty on the part of the defendants, as trustees and bailees of the property in question, and for which they should have been held personally responsible. They should have appeared and defended the suit in the State Court, and set up the pending proceedings in the Federal Court, which was a complete answer to the jurisdiction of the former; and if this defence had been overruled, a remedy existed by a writ of error to this Court, under the 25th section of the Judiciary Act."

Orton v. Smith, 18 How., 263, was a bill of peace authorized by the Statutes of Wisconsin in respect of certain lands, of which Smith, the plaintiff, and Orton, a defendant, claimed title, and prayed an injunction against Orton to prohibit him from setting

up his claim and therby casting a cloud upon the title of the plaintiff. During the pendency of this bill, Orton filed his bill in chancery in the Circuit Court of Milwaukee County, Wisconsin. The Circuit Court of the United States decreed the title to Smith and went on to provide as follows:

> "And, further, that the said defendant, John J. Orton, be, and hereby is, perpetually enjoined and forever barred from setting up or asserting any claim in or right to said premises, by virtue of or upon said bond and assignment. But this injunction and decree are not in any way to affect or operate against him, the said John J. Orton, in the prosecution of a bill pending in the Circuit Court of Milwaukee County, in this State, wherein he is complainant, and David Knab is defendant; this Court not intending to enjoin a proceeding in the State Court."

Mr. Justice Grier delivered the opinion of the Court, in the course of which he stated the rule as follows:

> "It is a rule absolutely necessary to be observed by Courts which have concurrent jurisdiction, that in all cases 'where the jurisdiction of a Court and the right of a plaintiff to prosecute his suit in it have once attached, that

right cannot be arrested or taken away by proceedings in another Court.' This rule, it is said, 'has its foundation not merely in comity, but in necessity. If one may enjoin, the other may retort by injunction, and thus the parties be without remedy.' See *Peck v. Jenness*, 7 How., 625; *Taylor v. Royal Saxon*, 1 Wall., 311."

Sharon v. Terry, 36 Fed. R., 337, was a bill filed on the 3rd of October, 1883, by William Sharon in the Circuit Court of the United States for the District of California, against Mrs. Hill, afterwards Mrs. Terry, for a decree adjudging a certain paper in her possession purporting to be a declaration of marriage between them, to be a forgery enjoining its use and directing its cancellation.

The bill alleged that the defendant claimed to be the lawful wife of the plaintiff and had made this declaration which under a statute of the state, constituted a marriage. The plaintiff alleged that these claims were wholly and maliciously false and made by the defendant for the purpose of injuring the plaintiff in his property, business and social relations, and of obtaining credit by the use of his name with merchants and others and thereby compelling him to maintain her, and of harrassing him, and, in case of

his death, his heirs, next of kin and legatees, into the payment of large sums of money to quiet her false and fraudulent claims and pretentions. The bill prayed that it be decreed that the defendant was not and never had been the wife of the plaintiff; that he did not make the said declaration of marriage or any marriage between them, and that she be enjoined and restrained from making such allegations of marriage with him, and that the said declaration be adjudged false, fraudulent, forged and counterfeited and be ordered to be delivered up to be cancelled and annulled. Subpœna was issued and served upon the defendant.

Afterwards, she commenced an action in one of the courts of the state against Sharon, alleging in her complaint that they were married by virtue of the said declaration, and praying that her marriage be declared legal and valid, and, then, that she be divorced from him by reason of certain infidelities to his marriage contract. Sharon answered, denying that he was ever married to her and alleging that the declaration of marriage was a false and forged instrument.

To the bill in the Circuit Court of the United States, the defendant, by plea in abatement, alleged the pendency of the action in the State Court, which was then on trial; insisting that the Circuit Court

ought to stay its proceedings in the original suit, until the State Court had expressed its opinion in reference to the validity of the contract, and then accept its judgment as conclusive. A supplemental answer was filed, alleging that the State Court had filed its decree and findings, re-affirming its adjudication of the genuineness of the contract. Replications having been filed and proofs taken by the parties, the cause was submitted to the Court, which decreed that the declaration of marriage was not signed or executed by Sharon and was not his declaration, but was false, counterfeit, fabricated, forged and fraudulent and null and void; and the defendant was decreed to deposit the same with the clerk of the Court, to be endorsed "cancelled;" and that the defendant, her heirs, assigns, executors, administrators and all persons claiming under her and her agents and attorneys be perpetually enjoined from alleging the genuineness or validity of the said instrument and from making any use of it in evidence or otherwise to support any right claimed under it, or making any claim or setting up any right, interest or claim of any kind, nature or by virtue of said declaration as Sharon's wife, and for any interest or right of any kind against him, his heirs, executors, administrators or successors in interest. Sharon died, pending the

bill, leaving a will of which he named his son and son-in-law executors. The son-in-law having declined to act, letters testamentary were issued to the son, who filed a bill of revivor.

The bill came on to be heard before Mr. Justice Field, Circuit Judge Sawyer and District Judge Sabine.

Upon the question how far the judgment of the Federal Court was affected by that of the State Court, the learned Justice speaks at length as follows: (p. 855.)

> "As congress has made such careful provision to secure to citizens of other states a right to transfer to a Federal Court cases in which they are sued in state courts, and prohibited further proceedings therein after proper application is made for removal, it would be strange, we repeat, if a defendant properly summoned in the first instance into that Court by a citizen of another state, could cut off and practically nullify the latter's constitutional right to a hearing thereby instituting a suit in a state court, which might involve in some of its phases a determination of the same matters. Such a pretension, as said in one of the authorities cited, cannot be tolerated. The jurisdiction of the Federal Court having

attached, the right of the plaintiff to prosecute his suit to a final determination there cannot be arrested, defeated, or impaired by any proceeding in a court of another jurisdiction. This doctrine we hold to be incontrovertible. It is essential to any orderly and decent administration of justice, and to prevent an unseemly conflict of authority, which could ultimately be determined only by superiority of physical force on one side or the other."

And many cases were cited in the reports of the State and Federal Courts.

The last case decided by this Court, is that of *Harkrader v. Wadley*, 172 U. S., 148, which was an appeal in proceedings upon a petition for *habeas corpus*.

In October, 1893, two suits in equity were brought in the Circuit Court of the United States for the Western District of Virginia by creditors of the Wytheville Banking & Insurance Company, a corporation of the state of Virginia, against that Company, Wadley, and the commonwealth attorney and special attorneys, to settle the affairs of the Company. Afterwards, Wadley was indicted in one of the Courts of the state of Virginia for the embezzlement of the funds of the company.

The Circuit Judge, Simonton, enjoined the commonwealth's attorney, special prosecutors and the creditors of the company from further proceedings upon the indictment and from exacting and requiring any bail or any commitment to imprisonment of Wadley thereon. Notwithstanding which he was taken and detained in custody.

Mr. Justice Shiras delivered the opinion of the Court and states the question thus:

> "Had the Circuit Court of the United States authority to issue a writ of *habeas corpus* to take and discharge a prisoner from the custody of the State Court when proceeding under a state statute not repugnant to the Constitution or laws of the United States, under which the prisoner had been indicted, for an offense against the laws of the state?"

And states the rule which we invoke above as follows: (P. 164.)

> "When a State Court and a Court of the United States may each take jurisdiction of a matter, the tribunal where jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed and the jurisdiction involved is exhausted; and this rule

applies alike in both civil and criminal cases. *Freeman v. Howe*, 24 How., 450; *Buck v. Colbath*, 3 Wall., 334; *Taylor v. Taintor*, 16 Wall., 366; *Ex parte* Crouch, 112 U. S., 178.

* * * * * * *

"But it is claimed under the second of the above propositions, that as the Circuit Court of the United States had obtained prior and therefore exclusive jurisdiction of the affairs and assets of the Wytheville Banking and Insurance Company, a corporation of the State of Virginia, by virtue of two suits in equity brought in said Court in October, 1893, by creditors of the said banking company, in which suits a receiver to take charge of the property of the bank, and a master to take all necessary accounts, had been appointed, it followed that the State Court had no jurisdiction, pending those suits, to proceed by way of indictment and trial against an officer for the offence of embezzlement, as created and defined by a valid statute of the State of Virginia. For the State Court to so proceed, it is claimed, constituted an interference with the Federal Court in the exercise of its jurisdiction; and that hence it was competent for the United States Court to

grant an injunction against the prosecution of the criminal case and to release the prisoner by a writ of *habeas corpus* directed to the sheriff."

And on page 166 he further says:

"It is further contended that when the parties sought to be enjoined have, as plaintiffs, submitted themselves to the Court, by a bill in equity, as to the matter or right involved, a bill for an injunction will lie to prevent interference by criminal procedure in another Court; and the decision of this Court *in re Sawyer*, 124 U. S., 200, is cited, where Mr. Justice Gray said: 'Modern decisions in England, by eminent equity judges, concur in holding that a court of chancery has no power to restrain criminal proceedings, *unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there.*' So, also, the case of *The Mayor, etc., of York v. Pilkington*, 2 Atkins, 302, is cited, and in that case, where plaintiffs in a chancery bill and cross bill to establish in equity their sole right of fishing in a certain stream, while their bill was still pending, caused the defend-

ant to be indicted at the York Criminal Court for a breach of the peace for such fishing. Lord Hardwicke awarded an injunction to restrain the plaintiff from all further criminal proceedings in other Courts, and said that if a plaintiff filed a bill in equity against a defendant for a right to land and a right to quiet the possession thereof, and after that he had preferred an indictment against such defendant for a forcible entry into said land, the court of equity would certainly stop the indictment by an injunction.

"But the observations quoted had reference to cases where the same rights were involved in the civil and criminal cases, and where the legal question involved was the same. Thus the case of the fishery, both in the civil and the criminal proceeding, involved the right of the defendant to fish in certain waters where the plaintiff claimed an exclusive right, and, as no actual breach of the peace was alleged, the public was not concerned. And when, in the later case of *Lord Montague v. Dudman*, 2 Vesey, 396, where an injunction was prayed for to stay proceedings in a mandamus, his ruling in *Mayor of York v. Pilkington* was cited, Lord Hard-

wicke said: 'This Court has no jurisdiction to grant an injunction to stay proceedings on a mandamus, nor to an indictment, nor to an information. As to *Mayor of York v. Pilkington*, the Court granted an order to stay the proceedings because the question of right was depending in the Court in order to determine the right, and therefore it was reasonable they should not proceed by action or indictment until it was determined.'"

While the learned Judge does not state the rule here invoked in terms yet he assumes it to be the law, and declines to apply it in the case before him, because the facts and circumstances of the bill in the United States Court and of the indictment in the State Court were not the same. Had they been the same, all that he says goes to show that he would have held that Wadley would have been entitled to be discharged, because the proceedings in the State Court would have been without jurisdiction. That is not the case here. In all respects, the matters in dispute in the original bill of the plaintiffs and the action of the state against the Company, were precisely the same.

Upon these authorities, it must be considered as settled.

1. That in a controversy which is within the jurisdiction of two Courts and a suit therein is brought in one of them, it may pursue the same to a final determination of all questions without interference by the other;

2. And that the Court first having jurisdiction may enjoin all proceedings in that secondly brought in the other Court;

3. And that this rule will be enforced when the two Courts of concurrent jurisdiction are one federal and the other state.

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W. D. MCHUGH,

Of Counsel.